

Appeal from a decision of the Nevada State Office, Bureau of Land Management, rejecting an application to correct mineral patent. N-50923.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Correction of Conveyance Documents--Patents of Public Lands: Corrections

To show entitlement under 43 U.S.C. § 1746 (1988) to the extraordinary remedy of correction of a mineral patent, an applicant must show both that there was an error in fact that requires correction and that considerations of equity and justice favor such correction. A purchaser of a tax deed to a mineral patent failed to make a sufficient showing to warrant correction of the patent when the evidence offered to show error in the patent was inconclusive and he failed to show that equity favored granting his application.

APPEARANCES: Harold A. Swafford, Esq., Reno, Nevada, for appellant Frank L. Lewis; Charles A. Jeannes, Esq., Reno, Nevada, for intervenor Dale L. Fraser; Burton J. Stanley, Esq., Office of the Pacific Southwest Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Frank L. Lewis has appealed from an October 11, 1990, decision of the Nevada State Office, Bureau of Land Management (BLM) that rejected his application for correction of Mineral Certificate Number 287 (the New Defiance Claim) issued to John Diebolder on September 30, 1879. The BLM decision under review found that Lewis "has no claim, as an heir or lienholder, to what John Diebolder, the original patentee earned, but only to the land that the original patentee sold" (Decision at 2). BLM found that Lewis had "no equitable stake in the efforts of the original patentee and no equitable interest in the land" and concluded that he "is not currently occupying the land has not in good faith and in the exercise of reasonable diligence invested substantially in improving the property." Id. BLM therefore concluded that "[t]here are no equitable considerations * * * to justify amending the patent." Id. Lewis filed a timely appeal.

Lewis acquired his interest in the patent by payment of \$25 for a tax deed issued by the White Pine, Nevada, County Clerk and Recorder, on August 17, 1965. On March 28, 1989, relying on his 1965 tax deed, Lewis applied to correct the description of the mineral patent. His application recites that, pursuant to 43 U.S.C. § 1746 (1988), he seeks a correction of the land description that will have the effect of situating the New Defiance Claim one mile south of the description appearing in the 1879 patent, to a location shown by a private survey that was run for the purpose of making the application (Application at 2). As his statement of reasons (SOR) explains in greater detail, Lewis wishes to correct the certificate of mineral patent to show that the New Defiance Claim has always been found on the ground in sec. 15, T. 16 N., R. 57 E., Mount Diablo Meridian, Nevada, although the description provided by the 1879 patent places it in neighboring sec. 10. He argues that there is no evidence of mining operations in sec. 10, while the workings described in the 1879 patent can be found in sec. 15 (SOR at 1, 2).

Contending that BLM relied in error on George Val Snow, 46 IBLA 101 (1980), a decision subsequently vacated by George Val Snow (On Judicial Remand), 79 IBLA 261 (1984), Lewis argues that considerations of equity have no place in an adjudication under section 316 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1746 (1988), and that a showing of error is sufficient to justify correction of a patent description. If, however, it be determined that equity is relevant in such cases, he claims that he has spent large amounts on planing for development of the claim, subject to approval of his application. Although he admits that 24 years passed between the time he paid the taxes on the New Defiance Claim and when he filed his application for correction of the patent, he states that he could not have filed his application earlier because no authority to correct patents existed prior to enactment of FLPMA in 1976. He also contends that BLM and the U.S. Forest Service have, by handling his application so as to lead him to believe it would be approved, committed themselves to correction of the patent. He ultimately takes the position that, as a matter of fact, the New Defiance Claim has always been found on the ground in sec. 15 and that there is no conflict between the New Defiance and the Dead Broke Claim owned by intervenor Dale L. Fraser and no reason why the relief sought should not be granted. See SOR at 3-7.

Both Fraser and BLM have answered the Lewis SOR. Fraser challenges the assertion by Lewis that there would be no conflict between his Dead Broke Claim and the New Defiance Claim were the New Defiance to be described in the manner sought by Lewis. Relying on reports of survey by Arnold C. Wood and Piedmont Engineering Company (Exhs. A and B to Fraser Answer), he concludes there would be a "substantial conflict between the New Defiance Claim and the Dead Broke Claim" and a group of unpatented mining claims owned by Westmont Gold Inc. (NMC 10087-100918). See Fraser Answer at 3, 9; Letter to BLM from Westmont dated Sept. 12, 1989. He concludes that this conflict is potentially damaging to him, because the New Defiance is the older of the two claims and his Dead Broke Claim would therefore become junior to the New Defiance. Id. at 2,3. He asserts, however, that considerations of equity

favor him over Lewis, because the Dead Broke has been in the Fraser family for over 60 years. Id. Fraser contends that the correction of the New Defiance patent would require a change in Mineral Survey Number 80, which granted 19.86 acres to the Dead Broke patentee. He also points to a discrepancy between surveyor's calls from section corners to the New Defiance Claim appearing in the original mineral survey and corresponding surveyor's calls used by the reports of survey prepared for Lewis that is unexplained by the Lewis surveyors. The observed discrepancy, if it remains unexplained, indicates that no error exists in the 1879 patent description. Id. at 5-6. Finally, Fraser points out that the patent description tied the claim to the New Defiance Mill Site (as well to the cited section corners) so as to establish that the New Defiance was located in sec. 10. Id. at 5.

The BLM answer consists of a point-by-point rebuttal of the Lewis SOR made in a statement furnished by the Acting State Director, Nevada. The Acting State Director reiterates the finding by the 1990 BLM decision that the evidence offered by Lewis does not justify the expense of a survey, estimated to cost "in excess of \$100,000.00" to determine whether a discrepancy as alleged exists in fact. The Acting State Director also observes that the land in both secs. 10 and 15 is essentially similar and that the discovery by Lewis of old workings in sec. 15 is insufficient to establish that the New Defiance Claim was located there.

Many prior Departmental decisions have considered the nature of the remedy made available by 43 U.S.C. § 1746 (1988), a statute that

invests the Secretary with discretionary authority to correct patents which contain an erroneous description of the patented land such that the description does not match the land the patentee either originally applied for or entered or intended to enter on the ground. * * * By regulation the term "error" is limited to mistakes of fact and not mistakes of law. * * * The first obligation of an applicant for amendment of a land description in a patent, then, is to establish that the land description questioned is in fact erroneous. * * * Without a clear showing of error, the Secretary is not empowered to exercise his statutory discretion to favor or disfavor the application. * * * Once the applicant has demonstrated the existence of error in the land description, his next obligation is to show that considerations of equity and justice favor the allowance of his application. [Citations omitted].

Shoshone and Arapahoe Tribes, 102 IBLA 256, 266, 95 I.D. 64, 70 (1988), reversed on other grounds, Foust v. Lujan, 942 F.2d 712 (10th Cir. 1991).

To determine whether Lewis had shown that there was an error of fact that would permit exercise of Secretarial discretion to correct his patent, the BLM decision of October 11, 1990, explained that BLM had conducted a field investigation in response to the Lewis application in order to verify

his allegation of error and to attempt to find "on-the-ground signs or evidence of the New Defiance Lode" (Decision at 2). At the putative site of the New Defiance Claim in sec. 15, BLM found that "[t]his site, despite recent notices of location of unpatented mining claims posted on trees, showed no recent mining activity and workings found were abandoned and in a deteriorating condition. Shafts and tunnels present were mostly caved-in, structures collapsed (contained square nails indicating a probable pre-1900 initial construction), eroded tailings partially bush covered, and access trails were dim and evidently used primarily by wildlife."

Concerning the patented site in sec. 10 also, "no exploration or development work was present. No visible mine workings, buildings, roads, trails or other improvements were in existence. There were white PVC posts present, that are evidently unpatented mining claim corners, but specific identifying locations notices were not recovered. No visual mineralization was present at this site." Id. It was concluded that "[t]his examination did not produce any conclusive evidence as to the physical location of the subject claim." Id.

The BLM answer explains that, while not explicitly stated in the 1990 decision, it was determined that Lewis had not shown an error in the 1879 patent that would justify spending money on a survey. See Acting State Director's statement at 1 ("based on the evidence that Mr. Lewis has provided, the BLM can find nothing that proves that the New Defiance is not in Section 10"). The failure of Lewis to respond to the analysis of his proof made by Fraser leaves open questions concerning Lewis's failure to explain how the tie made by the original survey to the mill site as well as to section corners was treated by his surveyors. Similarly, the question raised by Fraser concerning anomalous calls made by the surveyors hired by Lewis has not been answered. On the record before us, therefore, we cannot find that Lewis has shown the existence of an error of fact in the original survey that would justify a correction of the 1879 patent. As we observed in George Val Snow (On Judicial Remand), supra at 79 IBLA 264, the applicant in cases such as this must establish his entitlement to the relief sought. Lewis, however, has not established that there was in fact an error in the 1879 patent description, especially when the questions raised by Fraser and the facts revealed by the BLM field report are considered. While this circumstance, standing alone, might justify an evidentiary hearing to permit

a record to be made to facilitate a definitive disposition of the question whether there was an error in the 1879 patent description, the effect on this appeal of the requirement that an applicant for patent correction must also show that equity favors his application must first be considered.

[1] The October 1990 BLM decision here under review denied Lewis relief because "[t]here are no equitable considerations involved in this case of sufficient gravity to justify amending the patent." We decline

to follow the suggestion in the SOR that we should overrule our past decisions that require an evaluation of "equitable considerations" in such cases as this one, especially in view of the endorsement of this approach to decision making given by the Tenth Circuit in Foust v. Lujan, supra. In that case the decision ultimately turned on considerations of equity, the court concluding that approval of the application for patent correction was

required "[b]ecause of the severe hardship that Foust [the applicant] would face if he were to lose his home." Id. at 942 F. 2d 718. In Foust, the applicant was an elderly widower who had for 28 years occupied the land sought to be included in patented lands for which he had paid full value. He had lived on the land for the entire period, made further improvements, and maintained the property. Id. at 717. No such considerations are present here. The affidavit filed by Lewis with his SOR establishes that he bought the New Defiance Claim in 1965 for payment of back taxes and has visited the claim infrequently since then. He did not apply for the relief sought here until 1989, approximately 24 years after he acquired the tax deed. His argument that no legal means was available to correct errors in patents before enactment of FLPMA sec. 316 is simply incorrect, as the Acting State Director points out in his statement at page 2. See 43 U.S.C. §§ 693-97 (1970); see also reference to prior patent correction law and practice appearing in Foust v. Lujan, supra at 714.

While Lewis asserts he has spent large amounts on the property, the BLM field report establishes that those moneys were not spent for improvements on the site (BLM found none there), and Lewis's affidavit confirms that whatever accounts may be assigned to this claim on his books were incurred for professional fees and planning activity of various sorts. The record now indicates, therefore, that Lewis got exactly what he bought when he purchased the tax deed to land in sec. 10 from White Pine County in 1965.

Lewis contends that BLM should be estopped to deny him the relief he seeks because "Lewis relied on the position taken by the Forest Service and the BLM in expending moneys" (SOR at 3). No reference to any particular action by either agency is made in support of this argument. This Board has taken the position that no estoppel can arise without a representation in an official decision that satisfies all the elements of a successful estoppel claim as was described in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970). See Gabriel Energy Corp., 105 IBLA 53, 56-60 (1988); Kerr-McGee Corp., 118 IBLA 119, 127 (1991). Nothing in the record before us would support a finding that either agency ever issued a decision affecting Lewis that would create an estoppel of the sort he now seeks to invoke.

We therefore conclude that BLM correctly found Lewis had failed to show considerations of equity favored his application to amend the 1879 patent for the New Defiance Claim. Moreover, while Lewis asserts that the 1879 patent description was made in error, his proof concerning this aspect of his application is inconclusive. We therefore conclude that he has not shown the existence of an error in the 1879 patent that is capable of correction under 43 U.S.C. § 1746 (1988).

To the extent not specifically addressed herein, other arguments raised by Lewis on appeal have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge